INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement of the case	3
Summary of the argument	8
Argument	10–32
I. Respondent's refusal and failure to produce the books and papers under the Senate subpoena was clearly a contempt of the Senate. His subsequent wilful or negligent secretion or destruction of them was no less, but more, a contempt of that body, and the right of the Senate to punish for such contempt is not affected by such destruction or secretion; nor does the fact that some of the papers are thereafter secured from others purge him of his contempt	10
II. The power of the Senate to punish does not cease when the act complained of has been committed	15
Punishment as punishment	20
III. There is no distinction in principle between the judicial and legislative power to summarily punish for contempt	23
Completed act	30
Conclusion	32
Appendix	33

CITATIONS

Cases:	
Anderson v. *Dunn*, 6 Wheat. 204	16
Cooke v. *Tallman*, 40 Iowa 133, 135	30
Ex parte Grossman, 267 U. S. 87, 111, 117–118	9, 26
French v. *Senate*, 146 Cal. 604, 607, 608	30
Greeson v. *Imperial Irrigation Dist.*, 59 Fed. (2d) 529, 530, 531	10, 30
Heath v. *Wallace*, 138 U. S. 573, 583, 584	10, 30
Henry v. *Henkel*, 235 U. S. 219, 229	15, 30
Jones v. *United States*, 137 U. S. 202, 214–216	10, 29, 30
Kennett v. *Chambers*, 14 How. 38, 47, 48	10, 29
Kielley v. *Carson*, 4 Moore, P. C. C. 63, 13 Eng. Reprint 225	16
Kilbourn v. *Thompson*, 103 U. S. 168	16
MacCracken v. *Jurney*, 72 Fed. (2d) 560	1
Marshall v. *Gordon*, 243 U. S. 521 (61 L. Ed. 881)	9, 16, 20, 23

Cases—Continued. Page

McGrain v. *Daugherty*, 273 U. S. 135 ..... 8, 11, 12, 15
Re Chapman, 166 U. S. 661 ..... 9, 16, 22
Toledo Newspaper Co. v. *United States*, 247 U. S. 402 ..... 9, 23

Statutes:

Judicial Code, Section 240, subsection (a) 2
Judicial Code, Section 268 24
United States Code, Title 2, Section 194 9

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 339

CHESLEY W. JURNEY, PETITIONER

v.

WILLIAM P. MACCRACKEN, JR., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

No opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia appears on pages 109 to 121, inclusive, of the record, and is reported in 72 Fed. (2d) 560.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered July 9, 1934 (R. 121). The petition for certiorari was filed September 1, 1934, and certiorari was

granted October 8, 1934 (R. 123). The jurisdiction of this Court rests on subsection (a) of Section 240 of the Judicial Code, as amended and reenacted by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, U. S. Code, Tit. 28, c. 9, Sec. 347.

QUESTION PRESENTED

The power of the Senate to arrest and bring before it for punishment a recalcitrant witness who, after being served with a subpoena requiring him to produce his files touching a subject properly under investigation by the Senate, wilfully secretes or destroys documents in those files, or permits them to be secreted and destroyed.

STATEMENT OF THE CASE

The Senate of the United States on February 25, 1933, adopted Senate Resolution No. 349, 72d Congress, Second Session, directing a special committee to make a full, complete, and detailed inquiry into existing contracts for the carrying of air mail and ocean mail, and to report to the Senate the result of its investigation and its recommendations (R. 14).

The respondent is an attorney at law and represented the Western Air Express, Pan-American Airways, Transcontinental & Western Air, and other corporations interested in air-mail contracts (R. 20–26).

Pursuant to Senate Resolution No. 349, the special committee, on January 31, 1934, issued and had

served on the respondent its subpoena commanding him to appear instanter and to—

> bring all books of account, bank passbooks, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air-mail and ocean-mail contracts (R. 15).

The respondent appeared before the Senate Committee, but failed to produce any of the papers demanded, justifying his refusal on the ground that they were privileged under the relationship of attorney and client existing between him and those whom he represented (R. 16–26).

However, at the suggestion of the Committee, he sent a telegram to numerous clients, asking if they would waive the privilege claimed and authorize the production of the documents (R. 27, 28). The respondent telegraphed the Western Air Express, of which Harris M. Hanshue was president (R. 8), and asked whether this company would waive the privilege and authorize him to make the files in his possession available to the Committee. On February 1, 1934, Hanshue, by telephone, informed him that before he could decide on the subject of the telegram he desired an opportunity to look over the papers in respondent's files relating to the company's matters and to examine certain personal papers, copies of which he believed were in some of the files, and was sending for that purpose one Gilbert Givven, one-time secretary to Hanshue and the Washington representative of the Western Air

Express. That afternoon the said Givven made an appointment and called at the office of respondent, who permitted him to examine the file folders in the office and take therefrom certain papers, some of which related to air-mail contracts (R. 8). On the same day one Brittin, the executive vice president of the Northwest Airways, to whom the respondent had telegraphed, appeared at the office of the respondent but, MacCracken being engaged, went to the office of Mr. Lee, his partner, went through the voluminous Northwest files (R. 60), and took six papers out (R. 61). The respondent's partner, Lee, either went out and got the files which were examined with his permission, or sent for them (R. 62). Brittin took these papers down to his office and tore them up and threw them in the wastebasket (R. 66).

On February 2, 1934, the respondent was again called before the Committee and interrogated (R. 27 *et seq.*), and thereafter the special committee made a report to the Senate (No. 254), (R. 70) to the following effect: (1) That the committee had caused to be served on the appellant MacCracken a subpoena, as hereinbefore set out; (2) that the said MacCracken had appeared before the committee, "but has failed, refused, and declined to bring with him to the committee, or to make available for inspection, his correspondence and memorandums relating to air-mail contracts"; (3) that the said MacCracken had not only failed, declined, and refused to bring such correspondence

and memorandums to the committee, or to make it available for the committee's use, but had declined in an open session of the Senate Committee on January 31, 1934, and again at a public session of the committee on February 2, 1934, to bring said papers and correspondence to the committee and admitted at said public session of the committee "that between the date of the serving of the subpoena and the time of his testimony two certain files of correspondence concerning air mail has been removed from his office with his knowledge and consent"; (4) that the said MacCracken based his refusal upon his claim that as an attorney he had the right to determine for himself whether or not the correspondence and memorandums were private and confidential communications.

The committee further requested the Senate to take such action as it deemed wise to bring the said MacCracken before the bar of the Senate and require him to produce the papers and correspondence (R. 70–71).

In response to this report, the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant at Arms to take into custody the said MacCracken before the bar of the Senate, and to bring the correspondance, memorandums, books, and files referred to (R. 72, 73).

This warrant (R. 76) was served upon the respondent on February 2, 1934, and he was paroled in the custody of his counsel to appear at the bar of the Senate at noon, February 5, 1934 (R. 10).

On that date the Senate adopted Senate Resolution No. 172, that the President of the Senate issue a citation directing MacCracken and others to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of MacCracken, after a subpoena had been served upon him, and upon the adoption of this Resolution he was directed to be released from custody under Senate Resolution No. 169 (R. 80).

On February 5, 1934, the President of the Senate issued the citation to the Sergeant at Arms (R. 85), commanding him to summon the said MacCracken to show cause why he should not be punished for contempt, and the Sergeant at Arms cited the respondent to appear before the bar of the Senate on February 9, 1934 (R. 11, 12).

The respondent did not appear at the bar of the Senate in response to the citation, but declined to do so, alleging that the Senate was exceeding its constitutional authority in issuing the citation (R. 12, 93–101).

On February 9, 1934, the Senate issued a warrant, directing the Sergeant at Arms to arrest the respondent and bring him before the bar of the Senate to show cause why he should not be punished for contempt (R. 13–14).

On February 12, 1934, the petitioner arrested the respondent (R. 12), and that day the respondent filed in the Supreme Court of the District of Co-

lumbia his petition for a writ of habeas corpus (R. 1), which was immediately issued, returnable forthwith (R. 13). In response to this writ the petitioner herein immediately produced the respondent in court and demurred to the petition as insufficient in law on the grounds that the petition for the writ presented only the question of the jurisdiction of the Senate; that the petition showed on its face that the Senate was exercising a legislative function in the proceedings complained of and that the Senate, where an act interferes with its legislative functions has power in preservation of its functions without resort to judicial proceedings to exercise its authority to punish for contempt even though the offending act has been committed (R. 101–102).

The Court, after argument, remanded the respondent to the custody and control of the petitioner, discharged the writ, and dismissed the petition (R. 103). On appeal to the United States Court of Appeals for the District of Columbia, that judgment was reversed (R. 121), two justices dissenting. The Court in substance held that the Senate was without jurisdiction to inflict punishment upon MacCracken under its Resolution No. 172, because in its view, his act of disobedience was a completed act and as the Senate's inquiry in aid of its legislative function had ended so far as MacCracken was concerned, there was no obstruction of that legislative function, but that the Senate was assuming to impose punishment as punishment for the respondent's alleged contempt.

101012—34——2

SUMMARY OF THE ARGUMENT

1. There can be no question of the power of the Senate to require the production of the documents subpoenaed in this case. *McGrain* v. *Daugherty*, 273 U. S. 135. It is conceded that the subpoena was valid and within the authority of the Senate.

It is undisputed that the respondent, MacCracken, did not comply with the requirements of the subpoena and produce all the papers, files, and documents covered by the subpoena and in his possession or subject to his control at the time the subpoena was served upon him. In clear violation of the mandate of the subpoena, he permitted relevant papers to be taken away, secreted, and destroyed. This was a contempt of the Senate. The fact that respondent put it out of his power to produce the documents does not affect the right of the Senate to punish him for this contempt—indeed, it adds to the contempt—and the fact that some of the papers are thereafter secured by the Senate from others does not purge respondent of his contempt.

2. The power of the Senate to punish does not cease because the act complained of has been committed. This power of the Senate is necessary to enable it to fully perform its legislative function without obstruction and to prevent any hindrance to that function by an unwilling, recalcitrant, or contumacious witness.

To assert that this power ceases when the act of contempt is complete is to withdraw the admitted

power at the very time when its exercise is necessary. *Marshall* v. *Gordon,* 243 U. S. 521.

3. The power of the Senate to punish summarily for contempt is governed by the same principles applicable to the power of the judiciary to punish contempt. The test is the character of the act done and its direct tendency to prevent and obstruct the discharge, in the one case of a legislative, and in the other of a judicial, duty and function. *Marshall* v. *Gordon, supra; Toledo Newspaper Co.* v. *United States,* 247 U. S. 402. Since this power is inherent in the courts and in the Senate (and House of Representatives), the Senate may entertain a proceeding to vindicate its authority and to deter other like derelictions. *Ex parte Grossman,* 267 U. S. 87, 111, 117–118. It is not limited to the statutory remedy provided (U. S. Code, Tit. 2, Sec. 194). Both may be availed of. *Re Chapman,* 166 U. S. 661.

The documents taken by Mr. Brittin from the files in the office of respondent, MacCracken, were not all presented to the Senate. Such of those which recovered after being torn up by Brittin were made available by the efforts and search of investigators of the Post Office Department. Testimony of Post Office Inspector Bradley (Appendix to this brief) contained in a public document (Senate Document No. 162 (Pages 106 to 116), 73d Congress, 2d Session) of which this Court may take judicial no-

tice.[1] *Kennett* v. *Chambers,* 14 How. 38, 47, 48; *Jones* v. *United States,* 137 U. S. 202, 214–216; *Heath* v. *Wallace,* 138 U. S. 573, 583, 584; *Greeson* v. *Imperial Irrigation Dist.,* 59 Fed. (2d) 529, 530, 531.

The assertion that full compliance with the subpoena has been made ignores the facts. Immunity from contempt of the Senate cannot be claimed because an agency of the government has frustrated the attempted total destruction of the papers and saved what otherwise would have been lost, a result in no wise due to respondent. He cannot thereby escape the consequences of this additional contempt of the Senate and its process.

ARGUMENT

I

RESPONDENT'S REFUSAL AND FAILURE TO PRODUCE THE BOOKS AND PAPERS UNDER THE SENATE SUBPOENA WAS CLEARLY A CONTEMPT OF THE SENATE. HIS SUBSEQUENT WILFUL OR NEGLIGENT SECRETION OR DESTRUCTION OF THEM WAS NO LESS, BUT MORE, A CONTEMPT OF THAT BODY, AND THE RIGHT OF THE SENATE TO PUNISH FOR SUCH CONTEMPT IS NOT AFFECTED BY SUCH DESTRUCTION OR SECRETION; NOR DOES THE FACT THAT SOME OF THE PAPERS ARE THEREAFTER SECURED FROM OTHERS PURGE HIM OF HIS CONTEMPT

The respondent concedes, as he must, that the Senate had the power to require the production of

[1] This document is entitled "William P. MacCracken, Jr., et al. Extracts from the Congressional Record containing the Proceedings and order in the case of the *United States* vs. *William P. MacCracken, Jr., et al.,* alleging the Respondents in Contempt of the Senate in connection with a subpoena to produce certain papers before a Special Committee appointed to investigate the awarding of Air and Ocean Mail Contracts."

the documents subpoenaed, and that the inquiry which the Senate, through its committee, was conducting was one which it was empowered to make. Also, necessarily conceded is the power of the Senate to punish for the refusal to produce. These things were settled by this Court in *McGrain* v. *Daugherty*, 273 U. S. 135.

But counsel for respondent persists in this Court in the assertion made, and constantly reiterated, in the courts below that the sole question presented in this case is the right of the Senate to take the respondent into custody with a view to punishing him for the past commission of a completed act.

The predicate for this assertion is the claim that, when the proceedings to punish were entertained, the act of contempt provoking those proceedings "had been undone", and hence could not affect any function of the Senate or its committee (brief in opposition to petition for certiorari, page 4).

We deny both the proposition and the predicate upon which it is rested, and will later show that the Senate's "authority does not cease to exist because the act complained of had been committed", and further, that the act of contempt had not been undone, but that in any event such facts as might be adduced to show that the contempt had been purged must and should have been presented to the Senate.

The respondent was not ordered arrested to show cause why he should not be punished for the de-

struction or secretion of the documents only. The warrant of arrest (R. 14) directed the Sergeant at Arms to take the respondent into custody and bring him forthwith before the Senate "to show cause, if any he has, why he should not be punished for contempt of the Senate for the matters and things as shown by the reports of the special Senate Committee on Ocean and Air Mail contracts * * *."

These reports, as hereinbefore set out, declared that the respondent had failed, refused, and declined to bring or make available for inspection his correspondence and memorandums relating to air mail, and that he had admitted at a public session of the committee that between the date of the serving of the subpoena and the time of his testimony two certain files of correspondence concerning air mail had been removed from his office with his knowledge and consent.

It is thus clear that the removal of the files of correspondence from the respondent's office was but an incident and an aggravation of his contempt of the Senate, and was not the sole act of contempt or a substantive offense for which he was arrested and taken into custody before the bar of the Senate.

Granted the power of the Senate to require the production of documents and to punish for refusal to produce, which the respondent concedes and about which there can be no doubt since the decision of *McGrain* v. *Daugherty*, 273 U. S. 135, where all the cases are reviewed, the exercise of this

authority by the Senate cannot be impaired by the wilful or negligent conduct of the witness in secreting or destroying documents. We repeat, the right of the Senate to preserve its legislative power by compelling the production of documents is not controverted, nor is its power to punish a witness for contumacy for refusing to produce documents denied.

The contention of the respondent, ~~badly~~ stated, however, is that if destruction is added to the refusal to produce the documents, there is no longer an obstruction of the exercise of the legislative power and this puts it beyond the power of the Senate to cite the recusant witness for contempt, and has the same effect as if the Senate had never had the power. This is to destroy the power of the Senate to punish for contempt a witness who refuses to produce documents, because the witness can always destroy or secrete these documents and make it impossible to comply with the demand of the Senate. This proposition, it seems to us, refutes itself, "for to so hold would be to admit the authority and at the same time deny it."

Furthermore, the contention of the respondent that at the time the contempt proceedings were initiated by the Senate all of the papers of which he had had possession had been returned to the Senate is not borne out by the Public Record. Senate Resolution No. 172 directing the President to issue a citation to MacCracken to show cause why he should

not be punished for contempt was passed February 5, 1934 (R. 11). The papers removed from MacCracken's office had not then been found by the Post Office inspectors. Search for them commenced that evening and concluded the evening of February 6th. Such of these papers as were found, torn up, and later presented to the Senate were not made available by respondent. This cannot inure to his benefit, and the documentary facts refute the assertion of counsel for the respondent (brief in opposition to petition for certiorari, page 4) that the act complained of "prior to the proceedings to punish and the arrest of the citizen had been undone so that it no longer did, or could, affect any proceeding of the Senate or any committee thereof."

It might as well be argued that a witness who refused to testify would not be guilty of contempt if the Senate could and did obtain from another the information desired of the recusant witness.

We insist that the purging must be by respondent; *he* must purge *himself*.

As stated by Mr. Justice Groner in the dissenting opinion below (R. 118):

> The sole question involved on this appeal is the power of the Senate to arrest and bring before it for punishment a private citizen who, after being served with subpoena requiring him to produce his files relating to a matter then properly under investigation, allows documents in the files to be withdrawn so that he cannot comply with the terms of the subpoena.

We confidently submit that the existence of this power is established by *McGrain* v. *Daugherty, supra.*

Any facts or arguments presented on behalf of the respondent going to show that he attempted to purge himself of his contempt must be presented to the Senate, which is the tribunal having jurisdiction of this contempt, and have no place in the habeas corpus proceedings. *Henry* v. *Henkel,* 235 U. S. 219, 229.

II

THE POWER OF THE SENATE TO PUNISH DOES NOT CEASE WHEN THE ACT COMPLAINED OF HAS BEEN COMMITTED

The object of the Senate in ordering an investigation of air- and ocean-mail contracts was to aid it in legislating. "The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain* v. *Daugherty, supra.*

If, however, it can be argued that the Senate caused the arrest of the respondent, not merely for his refusal to produce the required memorandums and papers, but also for his aggravation of this offense in removing or permitting them to be removed and secreted or destroyed, and that the removal or destruction of these papers was a completed act, nevertheless, under the implied power to preserve its functions, and without resort to judicial proceedings under the general criminal law, the Senate has authority to punish, even

though the act complained of has been committed when the authority is asserted.

In support of this position we confidently rely upon *Marshal* v. *Gordon,* 243 U. S. 521, 61 L. Ed. 881. In that case the Court was called upon to consider whether or not the House of Representatives exceeded its power in punishing for contempt a person, not a member, who had written, published, and sent to the chairman of one of its committees an ill-tempered and irritating letter regarding the action of the committee. In considering this question, it became necessary for the Court, Chief Justice White writing the opinion, to delineate the extent of the implied power of the House to deal with contempts, and to determine if the acts of the nonmember were of such a character as to bring them within the implied power of the House to punish. In determining this question, the Court points out (p. 543) that the legislative history of the exertion of the implied power to deal with contempt by the Senate or House shows, among the principal instances, "contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel."

After reviewing *Anderson* v. *Dunn,* 6 Wheat. 204, *Kilbourn* v. *Thompson,* 103 U. S. 168, and *Re Chapman,* 166 U. S. 661, Chief Justice White then takes up the case of *Kielley* v. *Carson,* 4 Moore, P. C. C. 63, 13 Eng. Reprint 225. In that case Kielley was adjudged guilty of contempt by the House of As-

sembly of Newfoundland for having reproached a member in threatening language. The question was whether the Assembly had the power such as was possessed by both Houses of Parliament in England to adjudicate upon a complaint of contempt or breach of privilege. The case was heard by the Privy Council and it was determined that to the full extent of every measure necessary to secure the free exercise of their legislative functions, the House was justified in acting. The case is further quoted, however, to sustain the position that the power of *punishing anyone for a past misconduct as a contempt of its authority* was by no means necessary for the exercise of its functions by a local legislature, whether representative or not, but the Supreme Court definitely refused to follow this ruling, saying it "would unwarrantedly limit the power of Congress to deal with contempt." Commenting that the English rule was in accord with that recognized by the Supreme Court of the United States in *Anderson* v. *Dunn, supra*, it was said:

> that is, that in virtue of the grant of legislative authority there would be a power implied to deal with contempt insofar as that authority was necessary to preserve and carry out the legislative authority given. *While the doctrine of* Kielley *v.* Carson *was thus in substantive principle the same as that announced in* Anderson *v.* Dunn, *we must not be understood as accepting the application*

> *which was made of the rule to the particular case there in question, since, as we shall hereafter have occasion to show, we think that the application was not consistent with the rule which the case announced, and would, if applied, unwarrantedly limit the implied power of Congress to deal with contempt* (p. 541). (Italics ours.)

Later on in the opinion, after a discussion of instances in which the implied power had been asserted, the Court says (p. 544):

> And this latter statement causes us to say, referring to *Kielley* v. *Carson*, 4 Moore, P. C. C. 63, 13 Eng. Reprint 225, 7 Jur. 137, *that where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions,* and therefore without resort to judicial proceedings under the general criminal law, *we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it.* On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine, in the use of legitimate and fair discretion, how far from the nature and

> character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the continued existence of the inteference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference. (Italics ours.)

Under this language there can be no doubt that the act of the respondent, in refusing to produce documents, in removing or destroying them, or in consenting to their removal or destruction, is "an act of such a character as to subject it to be dealt with as a contempt." The Senate acquired jurisdiction to act on the subject with the resulting "right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence." If the act is of such a character as to subject it to be dealt with as a contempt by the Senate, then the exercise of the authority of the Senate is not subject to judicial interference "unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power."

For the purposes of this case, it cannot be assumed that the Senate proposed in its contempt proceedings to deal with the respondent in disre-

gard of discretion or by the mere exertion of arbitrary power, or that the Senate was attempting or intending to try the respondent for any wrongdoing other than the contempt of that body. And in this regard, it is pertinent to point out, as herein shown, that when the citation for contempt, pursuant to Senate Resolution No. 172, was issued on February 5, 1934, the Senate had not received the documents later recovered (February 5 and 6, 1934) by the Post Office Inspectors, which had been torn up and attempted to be destroyed. While the respondent was under arrest by virtue of the warrant of arrest issued February 9, 1934, when the writ of habeas corpus was served on February 12, 1934, the Senate had not acted upon the respondent's case, but was then considering it. Certainly, in these circumstances, it cannot be said that its action was not taken in an endeavor to protect its legislative power from frustration by the misconduct of respondent, and it is also clear that it was in no sense acting arbitrarily or in abuse of its discretion.

PUNISHMENT AS PUNISHMENT

Counsel for the respondent has insisted that the Senate has no constitutional power to administer punishment, as such, to a private citizen for criminal contempt of that body, relying upon the language of Mr. Chief Justice White in *Marshall* v. *Gordon, supra.* The Chief Justice, after saying that from the nature of the power "it is clear that

it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation", immediately clarified this language by saying, "that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." It is clear from this language that the implied power to punish for contempt embraces the power to compel the production of documents in order that the legislative functions may be performed, to compel the contumacious witness to testify in order that the legislative functions may be performed, and to punish for contempt the refusal to produce documents which inherently obstructs or prevents the discharge of legislative duty, and *a fortiori* to punish for contempt the obstruction and prevention of the discharge of legislative duty by the destruction of such documents.

When the power of Congress is applied to the contempt of the respondent in refusing to produce documents and, in order to prevent their production, in secreting or destroying them or permitting them to be secreted or destroyed—acts which clearly justified the exercise of the power of punishment—the power "is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred."

Marshall v. *Gordon, supra,* p. 542. In other words, if the substantive crime of which the recusant witness is guilty is denounced by statute, punishment under such statute must be left to the criminal courts. If, however, the contempt comes within the jurisdiction of the Senate to punish, notwithstanding that it may be denounced as a crime under the statute law, the Senate, "to vindicate its authority and to deter other derelictions", has the power to punish for contempt, but not the power to impose the sentence provided under the statutes for the substantive crime.

This is clear from *Re Chapman,* 166 U. S. 661. In that case there was a charge that Senators were yielding to corrupt influences, and Chapman was subpoenaed to appear before the committee, but refused to answer questions pertinent to the inquiry and was indicted and convicted under the Act of 1857 for such refusal. The Court there sustained the power of either House to conduct investigations and exact testimony from witnesses for legislative purposes, and said while Congress could not divest itself or either of its Houses of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended, nevertheless the statute making the act of Chapman a misdemeanor was constitutional, and both Congress and the courts could punish the contumacious witness without subjecting him to jeopardy twice for the same offense.

This Court, in *Marshall* v. *Gordon, supra,* recognizes this same principle when it calls attention to the distinction "which existed between the legislative power to make criminal every form of act which can constitute a contempt, to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority" (pp. 543–544).

III

THERE IS NO DISTINCTION IN PRINCIPLE BETWEEN THE JUDICIAL AND LEGISLATIVE POWER TO SUMMARILY PUNISH FOR CONTEMPT

This proposition is dealt with in *Toledo Newspaper Company* v. *United States,* 247 U. S. 402, wherein further clarification of the principles in *Marshall* v. *Gordon, supra,* was made by this Court. In that case the City Council of Toledo passed an ordinance in effect providing for three-cent fares on street railways. The creditors of the company filed a bill against the company to enjoin it from obeying the ordinance, on the ground that to do so would confiscate the property which they held in the company and would destroy the franchises the company enjoyed.

Immediately preceding the action of the Court granting a preliminary injunction and while that subject was up for consideration, an attachment for contempt was issued against the newspaper

company and the Editor of the Toledo News-Bee for certain publications concerning the controversy and the action of the court. The court directed the district attorney to present an information for contempt against the newspaper and its editor. The defendants demurred on the ground that the information stated no act within the power of the court to punish for contempt. The court found the defendants guilty under the information and imposed punishment by way of fine. This judgment was affirmed by the Circuit Court of Appeals, and the case was carried to this Court. The first proposition discussed by Chief Justice White was the contention of the appellants that there was a total want of power in the court to treat the matters charged in the information as a contempt and punish it accordingly, as a result of the provision of Section 268 of the Judicial Code to the effect—

> that the power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice.

In discussing this proposition and declaring that the statute "conferred no power and imposed no limitations not already existing" (p. 418), the Chief Justice said that while the Marshall case concerned the exercise of legislative power to deal with contempt—

> the fundamental principles which its solution involved are here applicable to the ex-

> tent that they may not be inapposite because of the distinction between legislative and judicial power (p. 418).

After again analyzing *Marshall* v. *Gordon,* the Court says of the quoted provision of Section 268:

> The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation; that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly. The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty, a conclusion which necessarily sustains the view of the statute taken by the courts below and brings us to the second question (p. 419).

Here this Court holds that the principles applicable to the legislative and judicial power to punish summarily are identical, and says that the test as to the power of the Courts is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty. Measured by this test there can be no question that the acts of the respondent were in contempt of the Senate, and both the refusal to testify and the secretion or removal of the files, or permitting their secre-

tion or removal, had a direct tendency to obstruct the discharge of its legislative duty.

Thus, courts are "inherently empowered to protect themselves and the function they perform by summary proceeding without a jury to punish disobedience of their orders and disturbance of their hearings." *Ex parte Grossman,* 267 U. S. 87, 117–118. So also the Senate is inherently empowered to protect itself and the legislative function it performs by summary proceeding, without resort to judicial proceedings under the general criminal law, "to vindicate [its] authority and to deter other like derelictions." *Ex parte Grossman,* p. 111.

Much reliance has been placed by respondent on the assertion that the act out of which arose the contempt had been undone by the production of all the papers subpoenaed. This assumed fact was given much weight in the majority opinion in the lower appellate court (R. 116, 117), and apparently had great influence with the majority of that court.

The petition for habeas corpus avers that, prior to the adoption of the contempt citation resolution (Res. 172), "petitioner had produced and delivered to the Senate of the United States, * * * to the best of his ability, knowledge, and belief, every paper of every kind and description in his possession, or under his control, relating in any way to air-mail and ocean-mail contracts (R. 11, par. 29).

Counsel for respondent stresses, as does the majority opinion, that the petitioner's demurrer admits the production of all the relevant documents.

We call attention to the fact that the averment of the paragraph of the petition is that "to the best of his ability, knowledge, and belief" petitioner had produced all papers. That is far from an assertion that he had *in fact* produced all. Significant is the use of the word "ability", by which attempted adroitness the pleader endeavors to avoid the grave question of the effect of respondent's action in putting beyond his ability the production of some of the required papers.

Furthermore, by Exhibits "E" and "F" to the petition, it is shown by respondent's own testimony before the Senate Committee that papers had been withdrawn from his files by Mr. Givven and Mr. Brittin (R. 31, 32, 54, 55). Mr. Brittin's testimony is that he tore up the papers which he procured (R. 62, 66). In the light of those exhibits, made a part of the petition for habeas corpus, it is difficult to perceive how the demurrer could be held to admit that *respondent* had produced *all* the subpoenaed papers and documents.

More important, however, is the fact that not all the papers were produced. This is established by the testimony before the Senate of Post Office Inspector J. A. Bradley, contained in Senate Document No. 162, 73d Congress, 2d Session (Appendix to this brief, pages 33 to 54).

That testimony is that Inspector Bradley, with other inspectors, on the evenings of February 5th and 6th, after the citation for contempt had been issued, went through sacks of waste papers in the basement of the National Press Building, sorted out fragments of the papers torn up by Brittin, pieced together such as were found and brought them before the Senate (Appendix, pages 33 to 54). Two especially important parts of that testimony were adduced on redirect examination by Senator Black (pages 49, 50):

> Question. I assume that in bringing those pieces out of there you probably found some pieces of some parts of correspondence that you could not piece up with anything else, did you not?
>
> Answer. Yes, sir. That is the part that he (Mr. Richardson) referred to there.
>
> Question. And that is the best you could get, and you got all you could?
>
> Answer. That is right.
>
> Question. Did you have any other pieces that indicated that you were missing anything of correspondence like that?
>
> Answer. Oh, yes. We were unable to find quite a few pieces to complete the file.
>
> Question. And you brought them back in that way?
>
> Answer. Yes, sir.
>
> Question. Incomplete?
>
> Answer. That is right, sir.

and on recross examination by counsel for Brittin (pages 50, 51):

> Question. Mr. Inspector, how do you account, in this working theory of yours, for what has become of the missing parts of letters you cannot find?
>
> Answer. I just do not account for it, sir. I know that we searched and searched and got everything that we could. It is possible that we overlooked a few little fragments. It is possible that they may have fallen out from a hole in a gunny sack, something like that.
>
> Question. It indicates to your mind, does it not, that between the time of deposit of a torn letter in the waste basket and the time you took it out of the sack part of the letter had been lost, does it not?
>
> Answer. Something happened to part of those letters, because we did not have fragments; and whether in the human equation we overlooked them or whether they were lost in the sack we have no way of knowing.
>
> Question. And the losing of a piece of paper could apply just as well to a complete letter as to a fragment, could it not?
>
> Answer. I presume it could; yes.

Thus, it is clear that not all the papers were completely salvaged.

That this court may properly take judicial notice of public documents is well established. *Kennett* v. *Chambers*, 14 How. 38, 47, 48; *Jones* v. *United*

States, 137 U. S. 202, 214-216; *Heath* v. *Wallace,* 138 U. S. 573, 583, 584; *Greeson* v. *Imperial Irrigation Dist.,* 59 F. (2d) 529, 530, 531.

Matters properly subject to judicial notice are not affected by a demurrer. In such case the demurrer is not taken to admit anything that is contrary to facts of which judicial notice is taken. *Jones* v. *United States, supra; Greeson* v. *Imperial Irrigation Dist., supra; French* v. *Senate,* 146 Cal. 604, 607, 608; *Cooke* v. *Tallman,* 40 Iowa 133, 135. Compare *Kennett* v. *Chambers, supra.*

Since it appears that respondent did not comply with the terms of the Senate Committee's subpoena; that in disregard of the mandate of the subpoena he permitted papers to be taken from his files, it is clear that the Senate had jurisdiction to proceed against him for contempt.

Any facts and arguments in extenuation or mitigation of the contempt must be presented to the Senate and may not be inquired into or considered by the Court in a habeas corpus proceeding. *Henry* v. *Henkel,* 235 U. S. 219, 229.

As was said by Mr. Justice Groner (R. 120), "the justification or extenuation of the act complained of here has no place in a proceeding of this character."

COMPLETED ACT

It is idle to argue that the powers of the Senate cannot extend to a "completed act." If the power of the Senate to cite for contempt or to punish for

a contempt was limited as respondent seeks to limit it to acts not completed, then the power would cease before there could arise any occasion for its exercise. Refusal of a witness to testify is a "completed act" and gives occasion for the exercise of the power to cite and punish. Respondent admits, as he must, in the light of the many adjudications, that such a refusal warrants the exercise of the power.

Finally, the secretion or destruction of the documents sought by the Senate's subpoena was no more a "completed act" than the refusal of the respondent to testify. To admit the Senate's power in the one and deny it in the more aggravated contempt subjects the power of the Senate to preserve its legislative function to the caprice, wilfulness, or malice of the recusant witness and permits such witness to purge himself by making his contempt more offensive. As was said by Mr. Justice Groner in his dissenting opinion (R. 119):

> To say at one moment that the power exists to punish for failure to deliver papers, and then to say that it is lost if the contumacy of the witness results in destruction rather than in deliberate withholding, seems to me to be both inharmonious and absurd. * * * Did this act of petitioner, which made compliance with the subpoena impossible, convert the contempt into an offense for which punishment could only be imposed—if at all—by another tribunal? I can think of

no good reason to suppose it did. The answer, it seems to me, depends upon the question, whether the act complained of tended to obstruct the free exercise by the Senate of its legislative functions. If it did, manifestly it was a contempt of the authority which had a right to require it to be done. To admit this and then to say that, because the nature of the act done made compliance impossible, the authority to impose punishment for the recalcitrancy was lost, appears to me to establish a distinction destructive of the purpose out of which the right arises and to make the power itself impotent and fruitless.

CONCLUSION

It is respectfully submitted that the judgment of the United States Court of Appeals for the District of Columbia was erroneous, should be reversed and that the Supreme Court of the District should be affirmed.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for Petitioner.

DECEMBER 1934.

APPENDIX

EXTRACT FROM SENATE DOCUMENT NO. 162, 73RD CONGRESS, 2D SESSION

Mr. BLACK. I will call Mr. Bradley as the next witness.

Testimony of J. A. Bradley

The oath was administered to the witness by the Vice President.

Direct examination by Mr. BLACK:

Question. Will you state your name?

Answer. J. A. Bradley.

Question. Where do you live?

Answer. Lincoln, Nebr.

Question. What is your occupation?

Answer. Post-office inspector.

Question. How long have you been connected with the Post Office Department as an inspector.

Answer. About 7 years.

Question. I will ask if you went to the National Press Building last week in connection with a search for any papers.

Answer. Yes, sir.

Question. When did you go down?

Answer. The evening of Monday, February 5.

Question. Who went with you?

Answer. Inspector R. F. Rittelmeyer.

Question. How do you spell that name?

Answer. R-i-t-t-e-l-m-e-y-e-r; and Clyde Fleming and V. V. Sugg.

Question. Where did you go?

Answer. We went to the basement of the National Press Building.

Question. Did you find any of the waste papers in the basement?

Answer. Yes, sir.

Question. How were they in the basement? In what repository were they?

Answer. They were in a large storage room in the basement, about 300 gunny sacks full of waste paper.

Question. Did you proceed to make a search of those sacks?

Answer. Yes, sir; we made a systematic search of the sacks.

Question. How did you proceed?

Answer. We arranged a temporary table and started in on one end of the accumulation of sacks and proceeded to examine each individual sack right straight through until about 12 o'clock that night.

Question. By that time had you found any papers in connection with air-mail transactions?

Answer. Yes, sir. There were a few papers that came from Colonel Brittin's office at 1090 National Press Building, but they were not of the date for which we were searching. They were as of February 2.

Question. You mean you found the sack as of the date of February 2?

Answer. Yes, sir.

Question. Did you find any others at a later time?

Answer. Yes; the following evening we found others.

Question. What date was that? First, how did you ascertain the date that the papers had been placed in the sack?

Answer. Each stack was dumped, and, of course, we were anxious to find Washington daily newspapers. That is a fairly good indication as to the date. Then we took the envelops showing the postmarks and thereby arrived fairly accurately at the actual date that the trash was taken away from the individual offices.

Question. Did you later find any other papers?

Answer. Yes, sir; the following evening we found quite a few other papers.

Queston. What date did the papers in that sack appear to have been placed in it?

Answer. February 1.

Question. February 1?

Answer. Thursday, February 1; yes, sir.

Question. And the other date at which you had found them was what?

Answer. Friday, February 2.

Question. Friday, February 2?

Answer. Yes, sir.

Question. Outside of the two dates, Thursday, February 1, and Friday, February 2, did you find any other air mail papers of any kind?

Answer. No, sir.

Question. I will ask you to look at the letter which I hand you, dated August 15, 1933, addressed to Mr. Lilly, and see if you can identify that letter.

Answer. Yes, sir; I can.

Question. How do you identify it?

Answer. By my initials on the back of each sheet.

Question. When did you place your initials on the back of each sheet?

Answer. It was at the time these papers were assembled.

Question. Assembled? What do you mean by "assembled?"

Answer. They were all in pieces. They were torn when we obtained them out of the sack, and we got them together, pieced them together, and some of them were initialed at that time and two or three were initialed in Mr. Patterson's office subsequently.

Question. Is the letter which is before you now one of the letters that you assembled from torn pieces of paper?

Answer. Yes, sir.

Question. It appears on each page there to have been put together. Was it torn exactly as shown by these fragmentary pieces?

Answer. Yes, sir; just that way.

Mr. BLACK. I would suggest that that letter should be marked as an exhibit. It has not yet been marked as an exhibit, although reference has been made to it.

The VICE PRESIDENT. Without objection, the letter will be marked "Exhibit A" for the record.

(The paper was marked "Exhibit A.")

By Mr. BLACK:

Question. On the top of that letter is there any pencil memorandum?

Answer. Yes, sir; there is.

Question. What is the pencil memorandum?

Answer. "MacCracken copy."

Question. Was that on the letter when you found it?

Answer. Yes, sir.

Mr. BLACK. We offer that letter now, exhibit A.

By Mr. BLACK:

Question. I send you another letter, which will be marked Exhibit B, dated August 28, 1933, and ask if you can identify that letter?

Answer. Yes, sir; I can.

Question. Where did you get that letter?

Answer. Out of the trash.

Question. Out of which trash?

Answer. Out of the trash the evening of February 6 in the basement of the National Press Building.

Question. In what sack did you find it?

Answer. It was in a sack as of February 1.

Question. In other words, the other papers in there showed you it was February 1?

Answer. Yes, sir.

Mr. BLACK. I will ask that that be marked Exhibit B, and I offer it.

The VICE PRESIDENT. Without objection, it is so ordered.

(The paper was marked "Exhibit B.")

By Mr. BLACK:

Question. I send you a letter dated February 28, 1933, addressed to Mr. K. R. Ferguson, signed "L. H. B.", and ask if you can identify it?—and let it be marked Exhibit C.

Answer. Yes, sir; I can identify it.

Question. Where did you get it?

Answer. In the same place, National Press Building, on the evening of February 6.

Question. In what sack?

Answer. In the same sack that came from the tenth floor as of February 1.

Question. Was it also torn into pieces?

Answer. Yes, sir.

Question. Were all three of these torn into pieces?

Answer. Yes, sir.

Question. And they were assembled by you and those working with you?

Answer. That is right.

Question. At a later date?

Answer. Yes, sir.

Mr. BLACK. We offer that letter in evidence.

The VICE PRESIDENT. Without objection, it will be marked Exhibit C.

(The paper was marked "Exhibit C.")

By Mr. BLACK:

Question. I send you a letter dated August 9, 1933, addressed "My Dear Ben" and signed "L. H. Brittin" and ask if you can identify it? I will let it be marked Exhibit D.

(The paper was marked "Exhibit D.")

Answer. Yes, sir; I can identify it.

Question. Where did you get it?

Answer. In the same sack in the basement of the National Press Building on February 6, in the sack as of February 1 from the tenth floor.

Question. Was it also torn into pieces?

Answer. Yes, sir.

Question. I send you a letter dated August 16, 1933, addressed to "My Dear Mr. Lilly" and signed L. H. Brittin" and ask you to identify it and let it be marked "Exhibit E."

(The paper was marked "Exhibit E.")

Answer. Yes, sir; I can identify it.

Question. What is it?

Answer. It is a letter we found in torn condition the evening of February 6 in the basement of the National Press Building in a sack from the tenth floor as of February 1.

Question. I send you a memorandum marked "Memoranda." Let it be marked "Exhibit F." I ask if you can identify it?

(The paper was marked "Exhibit F.")

Answer. Yes, sir; I identify it.

Question. Where did you get it?

Answer. In the basement of the National Press Building on the evening of February 6 in the sack from the tenth floor of the National Press Building as of February 1.

Question. I send you a copy of a day letter dated August 1, 1933, signed "Brittin", marked "Charge MacCracken & Lee", and ask if you can identify it?

Answer (after examining paper). Yes, sir.

Mr. BLACK. Let it be marked "Exhibit G."

(The paper was marked "Exhibit G.")

By Mr. BLACK:

Question. What is that? Where did you find it?

Answer. The torn fragments of that day letter were found in a sack of trash in the National Press Building on the evening of February 6 taken from a sack from the tenth floor as of February 1.

Question. I send you another letter dated September 28, signed "L. H. B.", addressed to Mr. K. R. Ferguson, and ask if you can identify it? Let it be marked "Exhibit H."

(The paper was marked "Exhibit H.")

Answer. Yes, sir; I can.

By Mr. BLACK:

Question. Where did you get it?

Answer. From a sack of trash in the basement of the National Press Building on the evening of February 6, coming from a sack from the tenth floor as of February 1.

Question. I send you a telegram dated September 19, signed by "Brittin", "Charge MacCracken & Lee", addressed to Mr. A. H. Brown, and ask if you can identify it? Let it be marked with the next exhibit number.

Answer (after examining paper). Yes, sir; I can.

(The paper was marked "Exhibit I.")

By Mr. BLACK:

Question. Where did you find it?

Answer. In a sack of trash in the basement of the National Press Building on February 6, coming from a sack from the tenth floor as of February 1.

Question. I send you another letter dated January 26, to Col. L. H. Brittin, from Mr. John H. Druar, and ask if you can identify it, and state where you found it?

Answer (after examining paper). Yes, sir; I can identify it.

Mr. BLACK. Let it be marked the next exhibit, and offered, also.

(The paper was marked "Exhibit J.")

By Mr. BLACK:

Question. Where did you get it?

Answer. It was found in a sack of trash in the basement of the National Press Building on the evening of February 6, coming from a sack from the tenth floor as of February 1.

Question. I will ask you to look at the remainder of these papers. I shall not offer them at the pres-

ent time, but shall have them identified and turn them over to counsel for Colonel Brittin. See if you can identify each one of them.

(The witness examined the papers.)

Mr. BLACK. While that is being done, Mr. President, if I did not make the statement in each instance that I offered the papers in evidence, I do now offer each of the previous exhibits in evidence.

The VICE PRESIDENT. They are offered and marked as exhibits according to the letters suggested by the Senator from Alabama.

Does the Senator desire these to be also offered in evidence?

Mr. BLACK. I am simply having them identified and shall ask some questions and then turn them over to counsel in order that he may see the remainder; and if he desires any of them placed in the RECORD we shall then do so.

The WITNESS. Yes, sir; I can identify them.

By Mr. BLACK:

Question. Where did you get those?

Answer. These were taken from the basement of the National Press Building on February 6, from a sack from the tenth floor as of February 1.

Question. There is one other that I did not have. By mistake I did not send it up. Was it also one of the papers?

Answer. Yes, sir.

Question. I send you now the remainder, in order that you may identify them, which are not offered as exhibits. Do you identify that entire group as the remainder now, Mr. Bradley?

Answer (after examining papers). Senator, these do not have my initials. They have Mr. Rittelmeyer's initials on them; and while they have

every appearance of being from that group, I presume he——

Question. Both of you put your initials on them and brought them up here together?

Answer. Yes, sir.

Mr. BLACK. We will ask that those simply be marked as "Exhibit X", without offering them as evidence to place in the record, but in order that counsel may see them and ascertain whether or not he desires to ask any questions about them.

The VICE PRESIDENT. Without objection, it is so ordered.

By Mr. WHITE:

Question. May I ask the witness how many letters or telegrams there are there which have been identified but which have not been introduced in evidence?

Answer. In this group, Senator, and in that one there?

Question. In both of the groups that you have identified, but which the chairman of the committee did not offer in evidence.

Answer. I presume there would be 20 on a guess, Senator; perhaps more.

Question. Will you not just run over them and see?

Answer. Yes, sir; I shall be glad to.

(The witness counted the papers.)

Mr. KING. Mr. President, while the witness is counting those papers, may I ask counsel for the respondent whether he has read in this morning's CONGRESSIONAL RECORD the letters beginning on page 2260 and ending on page 2264, and whether he admits, if he has read these letters, that the RECORD

here is a correct reproduction of the letters which were offered and identified yesterday?

Mr. RICHARDSON. Senator, I have in mind, sir, that one of the letters that was presented yesterday had at the top of it a reference to "Hay-Adams House", and I do not find in the CONGRESSIONAL RECORD any designation of "Hay-Adams House." Of course that is vitally important. I have not checked the other letters to know how many other things have been left out of those copies.

Mr. KING. I wish counsel would examine them, because it is unnecessary to have them printed again, now that they have been formally offered, if the RECORD correctly represents the letters which were produced yesterday and which have been formally offered today.

Mr. RICHARDSON. I will ask if I may do that when the Senate is progressing with the hearing of the other cases.

By Mr. WHITE:

Question. Now may I have an answer?

Answer. I count 27, Senator.

Mr. BLACK. That is all. Will you let Mr. Richardson have those letters now?

The VICE PRESIDENT. Are there any other questions?

Mr. BLACK. He does not want the ones that were identified, I presume, at this time. He wants to keep them separate. The ones that I wanted kept separate are the ones that had not been offered in evidence—in that envelop.

(Certain papers were turned over to Mr. Richardson.)

Mr. BLACK. Let me ask you one other question.

By Mr. BLACK:

Question. Were these sacks arranged according to the floors from which they came?

Answer. No, sir. We hoped they would be, but they were not.

Question. How did you designate the floor—by the contents?

Answer. By the contents; yes, sir.

Question. In other words, you had the names of the occupants of the various floors?

Answer. Yes, sir.

Question. And would find the mail in the bag, or the papers in the bag, and would by that means determine the floor from which the papers came?

Answer. Yes, sir; that is it.

Cross-examination by Mr. RICHARDSON:

Question. Mr. Inspector, there was no designation, then, sir, upon any of these bags which gave you any key at all to where the letters came from, or when they came. Is that correct?

Answer. That is right—no outside designation whatever.

Question. And when you say that letters were secured and are embraced in the letters which have been identified here as of date of February 1, you are simply presenting to the Senate the conclusion which you arrived at, based upon a method where you checked in a particular sack through the different dates of letters that were in there, that in all probability the letters there involved came down there on that particular date?

Answer. Yes, sir. The evidence was very conclusive.

Question. To you?

Answer. We were the ones making the examination.

Question. Precisely; but it was your conclusion as to the date?

Answer. Yes, sir.

Question. Based upon the fact that in a sack you found letters and other memoranda bearing a distinct date?

Answer. Yes, sir.

Question. And you concluded, because the letters in that sack bore a particular date, that the waste paper that went into that sack came down to the basement on that date?

Answer. There were not only letters——

Question. That can be answered "yes" or "no", sir.

Mr. McCarran. I ask that the witness be permitted to answer.

Mr. Richardson. So do I.

The Witness. Well, that answer should be qualified, sir.

By Mr. Richardson:

Question. Qualify it as you wish.

Answer. For the reason that every sack contained a certain number of daily papers from Washington, and that helped also in the identification.

Question. And it was from the dates of the papers, newspapers, letters, and documents in the sack that you reached the conclusion that was satisfactory to you that all of those papers came into that sack on that day?

Answer. Yes, sir; absolutely.

Question. If they had not come into the sack on that day, the contents of the sack would have looked just the same; would it not?

Answer. Yes, sir.

Question. How many sacks did you examine?

Answer. Approximately 300.

Question. All through?

Answer. Well, so nearly through that we were satisfied. In some cases we were able to eliminate sacks. For instance, we would open a sack, and if it contained a newspaper, a daily newspaper from Washington as of February 2, we knew that was not the sack we were looking for.

Question. And if there had happened to be put in that sack, by the attendant who rustles scrap paper for the building, a letter that had been deposited in the waste-paper basket the previous day, you never would have found it, would you?

Answer. Well, we depended not on one letter, sir. We satisfied ourselves from probably 8 or 10 particular exhibits before we were sure.

Question. Eight or ten of the documents found in the sack when you examined the date permitted you to arrive at a conclusion——

Answer. Yes, sir.

Question (continuing). Of when all the papers——

Answer. That is right.

Question (continuing). In a gunny sack came into the gunny sack?

Answer. Yes.

Question. Put there by someone you did not know?

Answer. Yes, sir.

Question. At a time you knew not of, for a purpose with which you were not acquainted; is that not so?

Answer. You are putting it in a rather roundabout way, but that is virtually what it is.

Question. Just another word and I am through. And as the result of the examination of the sacks that you examined, are these papers that you have identified here all of the papers of whatever kind, manner, or description that you could find containing anything that brought them back to the respondent here, Brittin?

Answer. Yes, sir. That is, every scrap of paper that we could find that we were satisfied belonged—had belonged at any time to Colonel Brittin, had been in his possession, we have brought before the committee here.

Question. And you found those papers in the February 1 sack?

Answer. Yes, sir.

Question. That you have described to the Senate?

Answer. Yes, sir.

Question. So that in your theory, as you saw it—and I appreciate it, sir—in your theory, as you saw it, there were placed in that sack on February 1 in the National Press Building over 30 documents traceable to Colonel Brittin?

Answer. The February 1st date there might be just a little bit misleading in this way, as going into the sack on February 1. I said as of February 1, because those charwomen go on duty at a quarter to 11 at night and work until 6 o'clock the next morning, and they may have been placed in there at any time from a quarter to 11 at night until 6 o'clock the next morning.

Question. You are not recanting at all this identification system you worked out, are you?

Answer. I think you will have to make yourself a little more clear.

Question. I wonder whether you have any doubt in your own mind, sir, as to the accuracy——

Answer (interposing). Not the slightest.

Question (continuing). Of the conclusion that you arrived at as to when a particular piece of waste paper was placed in a gunny sack?

Answer. Not the slightest, sir, as of February 1.

Question. Just by way of inquiry. How did you conclude that this belonged to Colonel Brittin [handing paper to the witness]? It is from exhibit X.

Answer. I did not know that that did come from Colonel Brittin. Just in that line, the same kind of stationery, the same as some of the others, and I said, "We will take no chances and we will just bring it up."

Question. You have not indulged in that liberal method of soul communication, have you, with any other papers that have been offered here?

Answer. I think not. I think it is just a matter of playing safe on that, sir, and you will find that the others are more or less connected.

Mr. RICHARDSON. That is all.

The VICE PRESIDENT. Are there any other questions?

Redirect examination by Mr. BLACK:

Question. In other words, when you found these scraps you could not tell, when they were first discovered, whether they would fit into this jigsaw puzzle or not?

Answer. No, sir; I could not.

Question. And you got this scrap along with other scraps?

Answer. Yes, sir.

Question. And you have pieced together the parts which you have there, and they show that they were Colonel Brittin's, do they not?

Answer. They do; yes, sir.

Question. So, so far as they are concerned, there can be no question but what they are Colonel Brittin's. Now may I ask you this further question? You opened up all of those sacks, did you not?

Answer. Yes, sir.

Question. And you found out from the 300 sacks, and observing the mail that was in them, that the custom with reference to those sacks, as shown by the 300, was such that you would find the mail of a certain day in a certain sack?

Answer. That is right.

Question. And you found that with reference to the particular day in which you found this correspondence which was destroyed?

Answer. Yes, sir.

Question. And you had been informed before you went down there, the date that Colonel Brittin had said he destroyed his correspondence, had you not?

Answer. Yes, sir.

Question. And you were looking for that date so far as this sack was concerned?

Answer. Yes, sir.

Question. And you did find in that sack the particular letters which have been referred to, and finally pieced them together?

Answer. Yes, sir.

Question. I assume that in bringing those pieces out of there you probably found some pieces of

some parts of correspondence that you could not piece up with anything else, did you not?

Answer. Yes, sir. That is the part that he (Mr. Richardson) referred to there.

Question. And that is the best you could get, and you got all you could?

Answer. That is right.

Question. Did you have any other pieces that indicated that you were missing anything of correspondence like that?

Answer. Oh, yes. We were unable to find quite a few pieces to complete the file.

Question. And you brought them back in that way?

Answer. Yes, sir.

Question. Incomplete?

Answer. That is right, sir.

Mr. BLACK. All right.

The VICE PRESIDENT. Are there any further questions?

By Mr. WHITE:

Question. Were there incomplete pieces other than those which have been identified here?

Answer. I think not, sir. I believe everything is here. I noticed an envelop with some envelops in here a moment ago that I had not identified.

Re-cross-examination by Mr. RICHARDSON:

Question. Mr. Inspector, how do you account, in this working theory of yours, for what has become of the missing parts of letters you cannot find?

Answer. I just do not account for it, sir. I know that we searched and searched and got everything that we could. It is possible that we overlooked a few little fragments. It is possible that they may

have fallen out from a hole in a gunny sack, something like that.

Question. It indicates to your mind, does it not, that between the time of deposit of a torn letter in the wastebasket and the time you took it out of the sack part of the letter had been lost, does it not?

Answer. Something happened to part of those letters, because we did not have fragments; and whether in the human equation we overlooked them or whether they were lost in the sack we have no way of knowing.

Question. And the losing of a piece of paper could apply just as well to a complete letter as to a fragment, could it not?

Answer. I presume it could; yes.

Mr. RICHARDSON. That is all.

The VICE PRESIDENT. Any further questions of the witness?

Mr. AUSTIN. I should like to ask a question.

The VICE PRESIDENT. The Senator from Vermont.

By Mr. AUSTIN:

Question. Did you examine sacks which you thought represented the 10 days preceding February 1?

Answer. Yes, sir. We started in—there were some of those sacks from around January 21, 22, and on up, clear up to the date of our visit up there.

Question. You examined every one of them?

Answer. Yes, sir.

Question. And every piece of paper in them?

Answer. No, sir; not every piece of paper. Might I explain we were able to eliminate a good many of those sacks conclusively that they were

not the date for which we were searching, and therefore we had no further interest in them.

Question. Were you not searching for waste from Colonel Brittin's office on any of those dates?

Answer. No, sir. Searching for waste as of February 1.

Question. And so you cannot testify that there may not have been waste from Colonel Brittin's office contained in each one of the gunny sacks for 10 days preceding the 1st day of February, can you?

Answer. There were—yes; I would have to qualify that a little ways, because the sacks we had reason to believe were of February 1 and February 2, along in there; we were much more careful in going through those than we were of those further back either way.

Question. Well, were you not interested to find Colonel Brittin's waste paper for 10 days preceding February 1?

Answer. No, sir.

Question. You did not look for it at all?

Answer. No, sir.

Question. How many sacks for each day did you find?

Answer. There are approximately 50 sacks that come down there each day. It is hauled away from the building about twice a week.

Question. How many sacks for each floor?

Answer. There are about four, an average of four, from the tenth floor particularly, that we know about.

Question. Did you find all these pieces of waste paper in one sack?

Answer. Yes, sir; right in the bottom of the sack.

Question. Do you remember how many sacks from the first floor which you concluded were taken down on February 1 were there?

Answer. From the first floor?

Question. Did I say the first? I meant the tenth floor.

Answer. No; I could not, but I should say there were at least four. I could not say positively, because we knew we had a number of false alarms, and we were rather of the opinion that we might find something and did not.

Mr. AUSTIN. That is all.

The VICE PRESIDENT. Are there any further questions?

Mr. BLACK. I just want to ask him one more question to make a matter clear.

By Mr. BLACK:

Question. When you went down there, you were informed that Colonel Brittin had testified that he had torn up and thrown into the waste-paper basket letters on a certain day, were you not?

Answer. Yes, sir.

Question. And you went down to look for those letters which had been torn up, according to Colonel Brittin's statement, on that certain day?

Answer. That is right.

By Mr. AUSTIN:

Question. I should like to ask the witness at whose instance did you make this search?

Answer. It was on our own initiative, sir.

Question. To whom do you refer when you say "our"?

Answer. Inspector Rittelmeyer and I were working together on this case, and we decided that it would be a good idea to look through that trash.

Question. Whom do you represent?

Answer. We represent—we are working for the Post Office Department, but we are also working for the Senate committee investigating this case.

Question. You had no special instructions for this search?

Answer. Not for this search, no sir; until later, we informed Mr. Patterson what we were doing, and he said, "That is fine."

Mr. AUSTIN. That is all.

The VICE PRESIDENT. Are there any further questions? May the witness stand excused?

Mr. BLACK. He may stand excused.

U. S. GOVERNMENT PRINTING OFFICE: 1934